IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last will and testament of GEORGE W. E. ATKINS, deceased, and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually, *Appellants*,

v.

J. H. TRAYER MARTIN, State Tax Commissioner (WILLIAM D. KELLY, Successor), *Appellee*.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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J. H. THAYER MARTIN, State Tax Commissioner (WILLIAM D. KELLY, Successor), *Appellee*.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The appellee has moved to dismiss or affirm under paragraph 3, Rule 12, of the Rules of the Supreme Court. This brief is submitted, pursuant to paragraph 3 of Rule 7 (third sub-paragraph), in opposition to such motion.

The Nature of the Case.

The New Jersey tax commissioner in levying the transfer inheritance tax on the death of a New Jersey resident included in the property assessed a trust fund of over $375,000, owned and held in the State of New York by a

New York trust company as trustee under an irrevocable trust agreement executed by the decedent seven years before his death. By the terms of the deed of trust the income was payable to the grantor for life and thereafter to his wife, and upon the death of the survivor the trustee was directed to pay one-half of the principal to each of his two sons if then living, with other dispositions in case either or both of the sons should then have died. The trust deed was executed in New York, the securities constituting the subject matter of the trust were then in New York and had been there for five years previously, and they remained and were administered by the trustee in New York at all times thereafter. The trust deed provided in terms that it was to be construed according to the laws of New York. The grantor's sons, to whom the principal was payable in the contingency that they should survive both parents, were and are non-residents of New Jersey. The grantor's wife having predeceased him and both of the sons having survived him, the contingencies were fulfilled and the principal on the grantor's death became payable to the sons, individual appellants herein, in equal shares. The commissioner thereupon levied a tax, based upon one-half of the then value of the trust fund, against each of the sons as beneficiaries of transfers intended to take effect at the decedent's death.

In proceedings in the New Jersey courts to review the action of the tax commissioner, the appellants appropriately raised the objection that both the property and the transfers involved were beyond the jurisdiction of New Jersey, and that if the New Jersey tax statutes are applicable thereto, they violate the Fourteenth Amendment of the federal constitution. The New Jersey courts have overruled this contention and have construed the statutes as authorizing the challenged assessments, in particular the provisions for taxation of transfers in contemplation of death or intended to take effect at or after death; and the New Jersey courts have further held that the statutes as so construed are not unconstitutional.

Point I.

The only issues raised by the motion are whether the questions involved have already been settled by this Court adversely to the Appellants, and whether they are substantial.

Jurisdiction of this Court having been invoked by appeal, as a matter of right under the statute, U. S. Code, Title 28, Section 344, subd. (a); argument of the cause on its merits is believed to be out of place at this time, on a motion to dismiss or affirm. The present issue is whether it is a fact, as alleged by the appellee as the ground of the motion, that "every question on which the decision of the cause depends has been so explicitly foreclosed by the previous decisions of this court as to render further argument thereof unnecessary" and that a substantial federal question is wanting. (Appellee's brief, last page.) Those are the appropriate grounds for any such motion, but if they are not well taken, the motion should be denied.

Equitable Ass. Society v. *Brown*, 187 U. S. 308, 311; *Zucht* v. *King*, 260 U. S. 174, 176.

Point II.

The federal questions presented have not been settled by this Court adversely to the Appellants.

Appellants' contention on this appeal is that the due process clause of the Fourteenth Amendment does not permit the inclusion in the estate of a decedent, for the purpose of measuring a transfer inheritance tax, of property not located or owned within the state seeking to levy such tax at the time the transfer becomes effective. The pertinent basic principle is that taxation of the transfer of property beyond the territorial jurisdiction of the state is unconstitutional. (*Frick* v. *Pennsylvania*, 268 U. S. 473.) Conceding that intangible personal property in the form of securities actually located elsewhere may sometimes be deemed to be within the state of domicile of the owner, on the fiction of

mobilia personam sequuntur, appellants contend that there is no place for the operation of that fiction in the case of a transfer which does not become effective, so far as nonresident contingent beneficiaries are concerned, until after termination of all ownership and control in the state seeking to impose the tax.

The appellants' contention on this motion is that this question is settled adversely to the appellants by *Pearson* v. *McGraw*, 308 U. S. 313, and *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605.

The cases cited by the appellee are not directly in point and are distinguishable with respect to this main issue. They do not consider the question of the taxability of transfers of property outside of the taxing state, made outside of the state to nonresidents thereof, and which become effective only after title, ownership and power of disposition have passed from the domiciled decedent whose estate is the subject of taxation.

In *Pearson* v. *McGraw*, *supra*, the jurisdiction of Oregon to impose a tax upon a transfer which admittedly was made in contemplation of death, and to include the property transferred with the grantor's estate subject to inheritance taxation, in spite of the fact that it was actually located outside of the boundaries of the taxing state, was upheld by this Court on the ground that the grantor was domiciled in Oregon at the time of the transfer. In that case, however, the effective transfer not only of the legal title but also of the beneficial ownership to the chief beneficiaries subject to the burden of the tax—in particular the recipients of the life income—took place concurrently with the execution of the trust agreement, the grantor having reserved to himself no life interest in or right of disposition over the property transferred, and the transfer held taxable was either identical with or the contemporaneous consequence of the grantor's act. The doctrine of *mobilia personam sequuntur* was applied to bring within the taxing jurisdiction of the grantor's domicile immediate vested interests in property to which up to that time the grantor held legal title.

On the other hand, in the case now under consideration on this motion the individual appellants, upon whom the burden of any tax will rest, took neither an immediate interest nor any vested interest in the property transferred by decedent's deed of trust, for by the terms of the deed their rights were expressly conditioned on their survival of both parents. (State of Case, pp. 29, 30.) Until the death of the decedent their father, their mother having already died, these appellants' possibilities of succession were only contingent, or perhaps taxable at best as vested subject to divestment, and when they eventually did become indefeasibly entitled to share in the trust fund the latter was no longer owned by a domiciled resident of New Jersey, but by the New York trustee; in fact it had been so owned for seven years. Accordingly at the time of the transfer to the appellants—the only transfer under which they actually received either the property or certain title thereto—there was no room for the application of the doctrine of *mobilia personam sequuntur* as the basis for a New Jersey tax.

Furthermore, we read the record on appeal in the *Pearson* case as showing that the respective beneficiaries of the trusts there under consideration were taxable in accordance with the quality and value of such interests as they existed at the time of the execution of the trust deed, i.e. as present or future, as life interests or as remainders. This was in harmony with the theory of taxation of a present transfer from the Oregon domiciliary. In the present case the New Jersey tax commissioner made no pretense at assessing the transfers to these appellants at the value, at the time of the execution of the trust deed, of contingent remainders subject to the grantor's reserved life interest, but at the full value of the trust fund when the appellants took title on the grantor's death. (State of Case, pp. 36, 37.) This argument is made, not to challenge the amount of the tax, but to show that the transfer here attempted to be taxed by New Jersey was in fact the transfer that took place at the time of decedent's death, when the appellants for the first time

became definitely vested and succeeded to the trustee's title. But that was not a transfer from a New Jersey domiciliary, and New Jersey had then lost jurisdiction to tax.

The record in the present case further shows that the tax commissioner of New Jersey expressly levied the tax as one on transfers "to take effect at death", rather than as on transfers taking effect at the time of the execution of the trust deed. (State of Case, pp. 36, 37.)

It is the theory of the New Jersey inheritance tax statute that the tax is on the succession and receipt of the property rather than on the transmission thereof.

Turner v. *Cole*, 118 N. J. Eq. 497, 500;
Hartford v. *Martin*, 122 N. J. L. 283, 286;
Bowes v. *United States*, 127 N. J. Eq. 132, 141.

See also—

Knowlton v. *Moore*, 178 U. S. 41.

The case of *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605, the other case chiefly relied upon by the appellee, is also inconclusive of the present issues for reasons similar to those which distinguish *Pearson* v. *McGraw*. In the *Van Dyke* case this Court granted a motion to affirm upon the authority of the *Pearson* case, and no criticism can be made of that disposition. The *Van Dyke* case involved a gift tax, not an inheritance tax. The donees received their interests immediately upon the execution of the trust agreements, the donor having reserved no life income or other interest in himself except possible rights of reversion in case of the death of the beneficiaries without issue, in default of appointment, or in other remote contingencies. The subject of the tax was not a transfer effective upon the termination of these reserved contingent rights, but the immediate gift itself, as of the date thereof.

It should be remarked, moreover, that in the *Van Dyke* case not only the donor but also the trustee donees were residents of Wisconsin; and while it is not directly so stated

in the record of the case, it may be inferred that the same thing was true of all of the beneficiaries.

Another significant feature of both *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission* not present in the case now before the Court, is that the transfers involved were obviously parts of a plan to evade taxation. No such inference can be drawn from the present record, nor was it even suggested in the findings or opinions of any of the New Jersey courts. It was merely held that the trust deed was executed in contemplation of death, which may be a very different thing and quite innocent of improper connotations. In the Pearson case, however, a prominent element in the transaction was the purchase outside of the state of federal reserve notes with the purpose of a contention that they were tangible personal property and so not subject to the principle of *mobilia personam sequuntur* as applied in tax cases. (*Blodgett* v. *Silberman*, 277 U. S. 1.) In the *Van Dyke* case, with a similar purpose, the subject matter was converted into the inconvenient and significantly abnormal form of seven and one half tons of silver dollars.

Point III.

The questions presented are substantial.

The differences that have been pointed out between the case now before the Court, and the cases of *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission*, which the appellee has selected as bearing the closest resemblance to it, are substantial differences. It is unnecessary to state those differences again, but their importance is clearly indicated by the decision of this Court in *Binney* v. *Long*, 299 U. S. 280, as contrasted with its previous decision in *Coolidge* v. *Long*, 282 U. S. 582. Both of those cases dealt with the validity of inheritance taxes levied under statutes of Massachusetts upon the interests of persons succeeding to property upon the death of a life beneficiary under deeds of trust. The question in each case was whether such succes-

sion could be constitutionally taxed by legislation enacted subsequent to the creation of the trusts. The *Coolidge* decision denied the power to tax any interests, even of a future nature, that became vested immediately upon the execution of the trust deed; in the *Binney* case it was held that future interests were taxable on coming into possession if they had originally been merely contingent.

The appellee's brief seeks to distinguish the *Binney* case on the ground that the New Jersey tax statute was enacted before the execution of the Atkins deed of trust. That of course is true, but is beside the point, which is that taxability of the transfer depended on conditions as they existed at the time the beneficiaries' interests became vested. In the case of the present appellants, we contend that when they became definitively entitled to the property the latter had passed beyond the jurisdiction of New Jersey, even its domiciliary jurisdiction, and had obtained an exclusive New York situs.

Misapprehension of the grounds of this appeal should not arise from appellee's citation of *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383. We are not protesting against double taxation. Those cases thoroughly establish the constitutionality of New York's right to tax the transfer of the assets held in New York by the appellant Central Hanover Bank & Trust Company, even though the public policy of that state, as now expressed in its constitution, (N. Y. Const. Art. XVI, Sec. 3) may renounce the exercise of such right. But there is nothing in either of the cases cited any more than in *Pearson* v. *McGraw*, which establishes any right in New Jersey to impose a tax. In *Curry* v. *McCanless* the grantor had retained control over the property, through a reserved power of appointment, and her exercise of such control at the time of her death was held to constitute a taxable event. In *Graves* v. *Elliott* like control was retained and exercised at the time of death, such exercise of control in that case consisting in allowing a power of revocation to go unused. A similar power of dis-

position was the basis of taxation in *Graves* v. *Schmidlapp*, 315 U. S. 657. In the present case, however, the decedent Atkins had no power whatever over the property at the time of his death.

The substantiality of the distinction between vested and contingent interests as a ground for differentiation with respect to taxation was also recognized by this Court in *Salomon* v. *State Tax Commission*, 278 U. S. 484.

Point IV.

Both branches of this motion should be denied.

As indicated at the outset, we have not attempted in this brief to set forth in full appellants' argument in support of the appeal. The sole objective has been to show that the contentions of the appellee, so far as this motion is concerned, are not well grounded; that the questions presented are substantial and are not foreclosed by the prior decisions of this Court.

Respectfully submitted,

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